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OFFICE OF THE ATTORNEY GENERAL



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Honorable Lee Helms
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Management Agency
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Clanton, AL 35045-5160

Emergency Management Agency -
Emergencies - Competitive Bid
Law - Exemptions

Discussion as to whether personal
services contract between Alabama
Emergency Management Agency and
contract management specialists
is exempt from the requirements
of the competitive bid law.

Dear Mr. Helms:

This opinion is issued in response to your request for
an opinion from the Attorney General

QUESTION 1

Does a personal services contract
between the State of Alabama Emergency
Management Agency (AEMA) and a corporation
for the services of a contract management
specialist satisfy the exemptions to the
Competitive Bid Law under Code of Alabama
1975, § 41-16-21(a)?

FACTS AND ANALYSIS

Your request presents the following additional facts:

The Alabama Emergency Management Agency (AEMA) is currently serving as the lead state agency for the Chemical Stockpile Emergency Preparedness Program (CSEPP). CSEPP affects six counties in Alabama that are near the chemical destruction site at the Anniston Army Depot in Calhoun County. Additionally, three other Alabama counties will be involved as reception and host counties for potential evacuees.

In connection with CSEPP, there are numerous planning contracts that must be awarded to complete CSEPP preparation outside of that occurring on the Anniston Army Depot itself. These contracts will result in about 1.5 million dollars in federal funds being expended. AEMA has the multi-jurisdictional responsibility for developing and implementing these contracts. However, we need the services of a contract management specialist in this area of emergency planning to: (1) oversee the development and issuance of the contracts; (2) ensure that the requests for proposal issued by this agency and the resulting quotations are properly evaluated; (3) ensure the contracts are properly written; and (4) ensure once the contracts are awarded, that an expert in this field will supervise the performance of the contractors and verify the quality of the deliverables. AEMA has neither contracting personnel nor a legal staff; however, we have been provided with federal funds to obtain a consultant who would provide these services.

Accordingly, AEMA must obtain the services of a contract management consultant in this unique area of technical hazards planning and emergency management. This CSEPP project requires a singular person, who has multiple skills and expertise in the CSEPP. AEMA does not envision these services can be "teamed" or "work shared" inside of a contractor's personnel resources for task accomplishment. Therefore, the requirement is viewed as one consultant whose overall required experience to accomplish all these tasks is mandated over the entire term of the performance period(s). To perform all the duties and responsibilities of CSEPP contract manager set out above, AEMA would need an individual with specific personal qualifications. These consultant requirements fall into three areas -- Contract Specialist (S); Contract Manager (CM); and, Contract Consultant (C). The general experience level requires the S/CM/C has personal experience in CSEPP. Experience for similar size and kinds of emergency management planning as the CSEPP Program is required. For example: experience in nuclear power plant emergency planning for surrounding communities. Experience in CSEPP planning in Alabama is highly desired.

In this regard and as noted in our package, the following issues are crucial to this person's success: 1) The ability to deal on a local and state level with numerous chemical stockpile planning problems and convince the six counties that the contractor deliverables are valid regarding maximum protection of their population, 2) the ability to supervise multiple contractors to obtain the maximum product while negotiating budget restrictions, and 3) the ability to solicit maximum cooperation of county planners and their directors with the contractors in a potential trade-off between available dollars and maximum hazard response planning. This last point

is a critical issue regarding prior CSEPP expertise as you may have seen in the bibliography section of our package. This hazard presents a complex, highly integrated planning problem requiring knowledge of chemical weapons, hazardous materials operations, response and reentry planning skills.

The job description for the consultant in question envisions, among other things, "a singular person, who has multiple skills and expertise in the Alabama CSEPP." He/she will oversee the development and issuance of complex contracts, supervise the performance of the contractors, and verify the quality of "deliverables." This person must interact and maintain this high degree of rapport with state and local public officials and contractors on an ongoing basis. There is no question this consultant will have to employ his personality to persuade local officials regarding his expertise and confidence; how the counties perceive him is critical to the overall success of the project.

S/CM/C specific experience requirements by consultant function follow:

(A.) Contract Specialist (S): Two or more years in a CSEPP state designing and developing off-post plans and procedures directly related to CSEPP is required. CSEPP experience in Alabama is desired. Detailed knowledge of CSEPP documents is required. Emphasis on task analysis with detailed knowledge of all federal CSEPP documents and detailed knowledge and capability regarding timeline project management software is required. Experience in writing RFPs, RFQs, and contracts; and detailed knowledge of the contract process for professional services and specific materials is required. Background in demographic studies and evacuation time

modelling is desired. Knowledge with contracts in the \$150,000 to \$500,000 range at a minimum is preferred.

(B.) Contract Manager (CM): Prior experience in contract management of CSEPP and related emergency contracts is required. Experience is preferred in the \$250,000-and-up range.

(C.) CSEPP Start Contract Specialist (C): Prior experience in emergency management functional task identification and analysis to include task identification, weighing, and resource allocation is required. Real-time experience in a state Emergency Operating Center or equivalent is required. Task training interface based on analysis is highly desired. Exercise and training background is required.

Training expertise and capability in the emergency management field is required. Expertise should include courses written, courses taught, and work accomplished at a training center -- for example: FEMA's Emergency Management Institute.

Recent proven technical and management expertise regarding the S/CM/C as demonstrated by resume is required. Knowledge of the CSEPP documents is critical to this area.

This situation and its requirements raise three related issues. First, we need to know whether such a consultant must be hired through a competitive bid process, or whether this situation meets the requirements for the exemption from competitive bidding established by Code of Alabama 1975, §41-16-21(a) for "contracts for the securing of services of . . . individuals possessing a high degree of professional expertise and skill where the personality of the individual play a decisive part."

If the exemption from competitive bidding does apply, we would like to obtain such a consultant through a sole-source contract. Therefore, the first part of our question is whether such a personal services contract must be competitively bid or whether we can award it on a sole-source basis.

The second part of our question concerns whether we can use a sole-source contract to obtain the services of an individual who is employed by a corporation. In other words, we need to know whether we can execute a sole-source contract with a corporation for the services of a specific individual within that corporation. This is important to us due to insurance and liability concerns, which are significant considerations in emergency management planning of this sort; from an insurance standpoint, hiring an individual within a corporation is far preferable to hiring an individual.

Code of Alabama 1975, § 41-16-20 (Article 2, Chapter 16) generally requires that:

"All contracts of whatever nature for labor, services or work . . . involving \$7,500.00 or more made on behalf of any state department, board, bureau, commission, committee, institution, corporation, authority or office shall, except as otherwise provided in this article, be let by free and open competitive bidding, on sealed bids, to the lowest responsible bidder."

This provision directly applies to State departments and agencies, including the State of Alabama's Emergency Management Agency (AEMA). Code of Alabama 1975, § 41-16-50 (contained in Article 3, Chapter 16) sets forth the requirement for competitive bidding on public contracts made by or on behalf of certain state educational and governmental entities.

The exemptions to the competitive bid requirements imposed upon state agencies by § 41-16-20 are contained in Code of Alabama 1975, § 41-16-21(a) which provides, in pertinent part, that:

"Competitive bids shall not be required for . . . contracts for the securing of services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part . . . [or to] contractual services . . . for which there is only one vendor or supplier . . . [or to] contractual services . . . which by their nature are impossible of award by competitive bidding. . . ." (Emphasis supplied; bracketed material supplied.)

Similar exemptions from the requirements of competitive bidding on contracts made by or on behalf of state educational or governmental entities are enumerated in Code of Alabama 1975, §41-16-51(a).

In this case, AEMA wishes to execute a contract with a corporation for the services of a contract management specialist. Code, Section 41-16-21(a) exempts from the competitive bid process ". . . contracts for the securing of services of individuals possessing a high degree of skill where the personality of the individual plays a decisive part. . . ." There is no statutory requirement that the contract be with the particular individual possessing the skill needed; the contract may be with an individual, partnership, or corporation who is the employer exercising control over the services provided by the individual in question. Such a contract would specify that the individual possessing the skill would furnish the required services.

Your opinion request clearly indicates that AEMA requires the services of a highly skilled professional whose qualifications uniquely satisfy the agency's need for an individual intimately familiar with technological hazards and chemical weapons planning. The job description for the consultant in question envisions, among other things, "a singular person,

who has multiple skills and expertise in the CSEPP," and who will oversee the development and issuance of complex contracts, supervise the performance of the contractors, and verify the quality of "deliverables." It is our understanding that the consultant in question will have to interact and maintain a high degree of rapport with state and local public officials and contractors on a regular basis. In addition, this consultant may have to employ his personality to persuade local officials to accept contractual terms that may fall short of their expectations due to fiscal constraints.

It therefore appears that the consultant's personality would play a decisive part in the quality of products and services provided under planning contracts that will be awarded in connection with the destruction of chemical weapons in Calhoun County. Based upon the information submitted in your opinion request, it is our opinion that the contract management specialist described by AEMA is within the class of "other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part." Code of Alabama 1975, §41-16-21(a).

CONCLUSION

It is, therefore, the opinion of this office that a contract with a corporation for the services of an individual would satisfy the exemption set forth in Code of Alabama 1975, § 41-16-21(a), if the individual met the standards set out in this statute.

QUESTION 2

Can AEMA execute a "sole-source" contract with a corporation for the services of an individual employed within a corporation?

FACTS AND ANALYSIS

The "sole-source" exception to the competitive bid requirements expressly pertains to the exemptions contained in Code of Alabama 1975, § 41-16-51(a)(13). See General Elec. Co. v. City of Mobile, 585 So.2d 1311 (Ala. 1991). Almost identical "sole-source" language is contained in § 41-16-21(a) which exempts from competitive bidding:

". . . contractual services and purchases of commodities for which there is only one vendor or supplier; contractual services and purchases of personal property, which by their very nature are impossible of award by competitive bidding. . ."

In General Elec. Co. v. City of Mobile, 585 So.2d 1311 (Ala. 1991), the Alabama Supreme Court interpreted the "sole-source" exception contained in § 41-16-51(a)(13). In this case, the Supreme Court held that, in order for a producer or supplier of goods or services to qualify as the "sole-source" exception to the competitive bid laws, three requirements must be satisfied. First, the good or service offered must be unique; second, the uniqueness of the product or service must be substantially related to the intended purpose, use, and performance of the good or service sought; finally, the individual or corporate entity seeking to be declared the "sole-source" must show that other similar goods or services cannot perform the desired objectives. Id. at 1315-16. Although the Court in General Elec. Co. was construing the language of § 41-16-51(a)(13), the test announced in that case would undoubtedly apply to the "sole-source" exception contained in § 41-16-21(a).

Whether the contract for the services of a contract management specialist satisfies the "sole-source" requirements set forth in General Elec. Co. is a question of fact, and not of law, and this office cannot make that determination for the awarding authority. If AEMA factually determines that the services proffered by the contract management specialist in question satisfy the "sole-source" test described above, then a contract for these services would be exempt from the requirements of competitive bidding.

CONCLUSION

If, in fact, AEMA determines that the services proffered by the contract management specialist in question satisfy the "sole-source" requirements set forth in General Elec. Co. v. City of Mobile, 585 So.2d 1311 (Ala. 1991), then a contract to secure these services would be exempt from competitive bidding.

QUESTION 3

Does the S/CM/C contract document attached to AEMA's opinion request conform to Alabama contract law, and is it a document that represents AEMA's intentions correctly?

FACTS AND ANALYSIS

This office cannot answer a question as to whether a proposed contract complies with Alabama law. The question itself is too broad and vague. If you wish to submit a question as to whether the proposed contract or a provision thereof complies with a specific provision of Alabama law, then this office will research and respond to your request in a timely manner. Furthermore, only AEMA would know whether the proposed contract correctly represents AEMA's intentions.

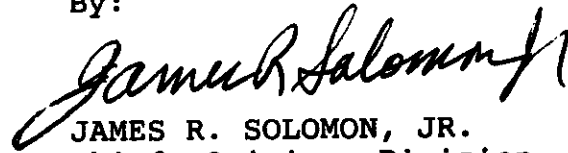
CONCLUSION

It is, therefore, our conclusion that the above-referenced question is too broad and vague and cannot be answered by this office.

I hope this sufficiently answers your questions. If our office can be of further assistance, please contact Robert Tambling of my staff.

Sincerely,

JEFF SESSIONS
Attorney General
By:



JAMES R. SOLOMON, JR.
Chief, Opinions Division

JS/RT/jho
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